

DOCKET FILE
ORIGINALBefore the
FCC MAIL SECTION
Federal Communications Commission
Washington, D.C. 20554

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MM Docket No. 93-191

DISPATCHED BY

In the Matter of

Amendment of Section 73.606(b), RM-8088
Table of Allotments,
TV Broadcast Stations.
(Pueblo, Colorado)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 21, 1993;

Released: July 13, 1993

Comment Date: September 3, 1993

Reply Comment Date: September 20, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed jointly by the University of Southern Colorado ("USC"), licensee of noncommercial television Station KTSC(TV),¹ Channel *8, Pueblo, Colorado, and Sangre de Cristo Communications, Inc. ("SCC"), licensee of commercial television Station KOAA-TV, Channel 5, Pueblo,² to exchange their channels, pursuant to the provisions of Section 1.420(h) of the Commission's Rules.

2. Section 1.420(h) allows a noncommercial educational television and a commercial television licensee or permittee to jointly petition for rule making to amend the Television Table of Allotments to exchange channels. The channel to be obtained by the noncommercial educational licensee or permittee would be reserved for noncommercial educational use and the channel acquired by the commercial licensee would be dereserved. Proposals must involve intraband channel changes, the stations involved must serve "substantially the same market, and the proposal must serve the public interest." See *Intraband Television Channel Exchanges*, 59 RR 2d 1455 (1986), *recon. denied*, 3 FCC Rcd 2517 (1988). Parties must offer assurances that any consideration resulting from the exchange will be devoted exclusively to activities related to the operation of the noncommercial educational television station.

3. SCC advises that it will provide financial support to USC, and will donate its translator Station K30AA, Colorado Springs, Colorado, as well as the existing licensed facilities of Station KOAA-TV to USC, if the requested exchange of Channel *8 and Channel 5 is approved. With respect to the public interest benefits of this proposal,

petitioners state that the channel exchange would enable USC to improve the quality of Station KTSC(TV)'s signal, increase the coverage of its existing translator network by operating translators at Grand Junction and Durango, Colorado, and offer additional noncommercial programming. Petitioners state that the planned expansion of USC's translator network will enable Station KTSC(TV) to provide a first noncommercial educational television reception service to approximately 83,000 new viewers in western Colorado, and a new reception service to 299,897 persons within either the proposed Grade B service contours of Station KTSC(TV) or within the service area of new translators to be constructed from a portion of SCC's monetary consideration to USC. As to the benefits to accrue to SCC, petitioners advise that although SCC has diligently strived to improve the facilities of Station KOAA-TV in order to provide an enhanced service to Pueblo and the surrounding area, it has been unable to attain its goal. Specifically, SCC advises that it has been precluded from relocating Station KOAA-TV to an antenna farm used by other commercial stations in the joint Colorado Springs-Pueblo market because of the restrictions of the minimum distance separation requirements of Section 73.610(b) of the Commission's Rules. Approval of the requested channel exchange would enable SCC to achieve its goal of expanded service to the entire market, while simultaneously providing substantial benefits to USC.

4. *Background.* USC is licensed to operate Station KTSC(TV) from a site on Baculite Mesa, at coordinates 38-22-25 and 104-33-27. USC previously used a television translator on Channel 53 to provide service to Colorado Springs, which lies partly within its predicted principal community contour but which does not receive adequate service from Station KTSC(TV) due to intervening terrain barriers. In August 1990, USC was required to cease operation on Channel 53 when a full power station commenced operation on that channel. Since USC offers various educational and outreach services in Colorado Springs, it attempted to locate a new channel at the Baculite Mesa site for its translator service to continue serving that community, but was unsuccessful in its efforts at that time.³

5. In order to enable USC to continue providing public television reception service to the Colorado Springs area, USC filed a modification application (File No. BPET-900122KE) to change its site. On February 28, 1991, the Commission granted Station KTSC(TV)'s modification application, with conditions. The permit included a waiver of Section 73.610(b) of the Commission's Rules to permit use of a site for Station KTSC(TV) at an antenna farm on Cheyenne Mountain at coordinates 38-44-44 and 104-51-39. That site is 296.1 kilometers (184 miles) from co-channel Station KJCT(TV), Grand Junction, Colorado, at coordinates 39-02-55 and 108-15-06, and 291.9 kilometers (181.3 miles) from vacant co-channel 8 at Laramie, Wyoming, at reference coordinates 41-18-47 and 105-35-26. Pursuant to the requirements of Section 73.610(b) of the Commission's Rules, a minimum distance separation of 304.9 kilometers (189.5 miles) is required between co-channel stations in

¹ On February 28, 1991, USC was granted a construction permit (File No. BPET-900122KE) to operate Station KTSC(TV) from a transmitter site on Cheyenne Mountain, as indicated in paragraph 5, *infra*. Although the construction permit expired on February 28, 1993, an application for an extension of time to complete the modification of Station KTSC(TV)'s facilities has

been filed (File No. BMPET-930216KE).

² USC and SCC will be referred to collectively in this proceeding as "petitioners."

³ USC currently operates translator Station K15BX under special temporary authority (STA) to provide service to Colorado Springs.

Zone II. Station KTSC(TV) stated that intervening terrain factors, combined with its willingness to reduce its effective radiated power to the north and west of Pueblo, would reduce the possibility of interference to the Grand Junction, Colorado, station or to a future station on Channel 8 in Laramie, Wyoming.

6. *Discussion.* Initially, we note that petitioners' proposal appears to comply with the criteria established in *Intraband Television Channel Exchanges*, 59 RR 2d 1455 (1986). Both stations are within the same band and serve the same community of license. Furthermore, USC states that it intends to use the proceeds from the exchange of its Channel *8 with SCC's operation of Station KOAA-TV on Channel 5 solely for improvements related to the operation of Station KTSC(TV). Each station could benefit by potentially improving the quality of their facilities, thus providing a public benefit by rendering either new or improved commercial and noncommercial service. Finally, Pueblo would retain both commercial and noncommercial stations after the exchanges, if the proposal is adopted.

7. We have several areas of concern on which we request comment. The first concern is related to SCC's preferred site for Station KOAA-TV on Channel 8. Although SCC proposes to use USC's presently authorized construction permit site for Station KOAA-TV at coordinates 38-44-44 and 104-51-39, as indicated above, we note that USC has not operated Station KTSC(TV) from the site proposed in its construction permit. Since no facilities have been operated at this site, we believe it appropriate to propose to modify SCC's authorization for Station KOAA-TV to specify the site in USC's outstanding license for Station KTSC(TV), and not its construction permit site.⁴ SCC can operate Station KOAA-TV on Channel 8 at the presently licensed site of Station KTSC(TV), which is also the licensed location of Station KOAA-TV's present operation on Baculite Mesa, at coordinates 38-22-25 and 104-33-27, in conformity with the minimum distance separation requirements of the Commission's Rules, rather than the site specified in the construction permit issued to USC at co-

ordinates 38-44-44 and 104-51-39.⁵ Therefore, we will propose the channel exchange and dereservation of Channel *8 and the reservation of Channel 5 at coordinates 38-22-25 and 104-33-27 to accommodate the petitioners' proposal.

8. Our second area of concern is related to USC's proposed noncommercial operation on Channel *5 at Pueblo at the presently licensed site of Station KOAA-TV. As previously noted, approximately two years ago, USC was granted a waiver of Sections 73.610 and 73.685 based upon its stated need to continue providing noncommercial educational television service to Colorado Springs without relying on a translator to provide a viewable signal to that community. With respect to the instant proposal, we note that according to petitioners' engineering exhibit, shadowing occurs in Colorado Springs from the KOAA-TV/KTSC(TV) licensed site which requires a translator to provide service to that portion of their service area. Therefore, while we expect USC to continue its commitment to serve Colorado Springs, in light of its current proposal, we do not believe it is generally desirable to replace primary service to that community, as contemplated in connection with USC's waiver request, with a secondary service which could ultimately be forfeited to a full service television operation, and we invite comments in this regard. In the event USC plans to discontinue its service to Colorado Springs, we would question the public interest benefits of the proposal.

9. Our third area of concern is related to the potential gain in noncommercial reception service presented by USC's proposal. According to petitioners, the channel exchange will enable USC to provide new noncommercial reception service to 299,897 persons residing within either the proposed Grade B contour of Station KTSC-TV if permitted to operate on Channel *5, or within the service area of the new translators USC proposes to construct at Grand Junction and Durango with the funds derived from the channel exchange.⁶ Further, petitioners' engineering studies reflect that USC's Station KTSC(TV) currently pro-

⁴ In this regard, although USC has filed an application for an extension of time within which to construct the unbuilt facilities of Station KTSC(TV) on Cheyenne Mountain, we note that pursuant to the terms of Section 73.3535(b) of the Commission's Rules, grant of such an extension request requires a showing that either construction is complete and testing is underway; or that substantial progress has been made in the construction of the station; or that reasons clearly beyond the permittee's control prevented construction and that all possible steps have, nevertheless, been taken to resolve the problem and to proceed with construction.

While USC's involvement in this rule making may provide a sufficient basis to warrant an extension of its construction deadline, it does not absolve it from its commitment to complete the construction of Station KTSC(TV)'s modified facilities. Permittees are expected to abide by the Commission's Rules regarding time constraints and limitations governing extension requests in order to avoid unwarranted delays in service to the public. In the absence of a showing that the instant proposal could adversely affect USC's commitment to construct the modified facilities for Station KTSC(TV), its decision to defer construction must be viewed as a business judgment and not a situation beyond its control. See, e.g., *New Dawn Broadcasting*, 63 RR 2d 1198 (1987).

⁵ As indicated in paragraph 5, *supra*, the allotment of Channel 8 at USC's construction permit site would be short spaced to

Station KJCT(TV), Channel 8, Grand Junction, Colorado, and to vacant Channel 8 at Laramie, Wyoming. Also, as previously stated, although USC was granted a waiver for Station KTSC(TV) on Channel *8 based in part on the need to continue providing public television service to Colorado Springs without relying on a translator to accomplish its goal, we do not believe it appropriate to determine at the rule making stage whether a similar request from a commercial licensee would be granted at the application stage.

⁶ Petitioners advise that improvements in USC's translator network would result in an increase in Station KSTC(TV)'s viewers in Grand Junction and Durango, Colorado, as well as communities located in the following counties:

	Population (1990 U.S. Census)
Mesa	93,145
Delta	20,980
Montrose	24,423
Ouray	2,295
San Miguel	3,653
Dolores	1,504
San Juan	745
La Plata	32,284
Montezuma	18,672
Gunnison	10,273
Total	207,974

vides service to 598,614 persons from its licensed site, whereas SCC's Station KOAA-TV currently serves 604,012 persons from the same location. Thus, USC would gain service to 5,398 persons by moving Station KTSC(TV) to Channel *5. According to petitioners, the proposed population gain to USC's operation of Station KTSC(TV) on Channel *5 is attributable to the transmission equipment that USC will receive from SCC's Station KOAA-TV as a condition of the channel exchange. Additionally, petitioners' engineering exhibit states that SCC's translator Station K30AA, Colorado Springs, which will be donated to USC in the channel exchange, currently provides service to 340,260 persons within its Grade A contour. This represents an additional potential gain of 211,633 persons over USC's STA operation of its translator Station K15BX, Colorado Springs. Furthermore, petitioners advise that USC's planned expansion of its existing network of 11 translators throughout Colorado by adding translators at Grand Junction and Durango will enable USC to provide a first educational service to an additional 82,871 persons in and around those communities. The majority of USC's service gain showings are related to its proposed translator expansion. However, since Commission policy is to treat translators as secondary services for purposes of spectrum priority, USC's projected translator expansion would not be protected against the initiation of a full service facility.⁷ Thus, the projected population gains attributed to USC's proposed operation of translators at Grand Junction, Durango and Colorado Springs may be too speculative to be considered in the context of this rule making proceeding. Therefore, we may not consider these gains in conjunction with the overall benefits associated with this proposal. Petitioners are requested to state whether they would be willing to accept adoption of this proposal conditioned on the commencement of translator service as proposed by USC.

10. In view of the above, we will propose to modify the license of Station KTSC(TV), Channel *8, Pueblo, Colorado, to specify operation on Channel *5 and to modify the license of Station KOAA-TV, Channel 5, Pueblo, to specify operation on Channel 8, pursuant to the provisions of Section 1.420(h) of the Commission's Rules. As indicated above, if this proposal is granted, Station KTSC(TV) may operate on Channel *5 at the existing licensed site of Station KOAA-TV.⁸

11. This proposal is not affected by the Commission's current freeze on television petitions for rule making or construction permit applications for vacant allotments since this proposal involves an exchange of allotments, with no change in the overall number of allotments in the community and no new allotment will become available for application. See *Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, July 29, 1989.

12. We believe the public interest would be served by proposing the allotment of Channel *5 to Pueblo as a substitute noncommercial educational channel for Channel

*8, as well as the allotment of Channel 8 to Pueblo as a substitute commercial channel for Channel 5. Accordingly, we seek comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules with respect to Pueblo, Colorado, as follows:

City	Channel No.	
	Present	Proposed
Pueblo, Colorado	5, *8, 26+, 32-	*5, 8, 26+, 32-

13. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

14. Interested parties may file comments on or before **September 3, 1993**, and reply comments on or before **September 20, 1993**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners' counsel, as follows:

Wayne Coy, Jr., Esq.
Cohn and Marks
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036
(Counsel for University of Southern Colorado)

Kevin F. Reed, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(Counsel for Sangre de Cristo Communications, Inc.)

15. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.606(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

16. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is

⁷ Section 74.702(b) of the Commission's Rules provides that changes in the existing Television Table of Allotments may be made without regard to existing television translator stations and that, where such changes result in initiation of service which results in interference to reception of the signal of a full

service station, the licensee of the interfering translator station must eliminate the interference or file applications for changes in their frequency.

⁸ As stated previously, Station KTSC(TV) and Station KOAA-TV are both licensed to operate from an electronics site on Baculite Mesa at coordinates 38-22-25 and 104-33-27.

no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.